



June 30, 1999

Ms. Lisa A. Brown
Bracewell & Patterson, L.L.P
Attorney's At Law
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR99-1827

Dear Ms. Brown:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124532.

The Houston Independent School District (the "district" or "HISD") received a request for all documents related to the Jerry Asher case. On March 16, 1999, you submitted to this office a representative sample of the requested information, excluding information that you argue may not be disclosed to this office. The representative sample consists of intra-office memos of Bracewell & Patterson and letters from Bracewell & Patterson to the Texas Association of School Boards.¹ Information that you argue may not be disclosed to this office falls into two categories: 1) information subject to a protective order issued by a federal court, and 2) information protected by the Family Education Rights & Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In a letter dated March 24, 1999, you state that the requestor revised his request to exclude information that is covered by the attorney-client or attorney work product privileges. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim that the requested information is protected by "the common law and constitutional notions of privacy." Section 552.101 excepts from disclosure "information considered to be

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common-law right to privacy. Information is protected by the common-law right to privacy if (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). None of the information submitted to this office is protected from disclosure by common-law or constitutional right to privacy under section 552.101.

You also claim that the requested information is protected by section 552.107(2). Section 552.107(2) provides that information is excepted from required public disclosure if “a court order has prohibited disclosure of the information.” This office has interpreted the language of section 552.107(2) to protect only information that a court has specifically ordered not to be disclosed. *See, e.g.*, Open Records Decision Nos. 309 (1982), 143 (1976). The district has submitted to this office the protective order in *Becerra v. Asher*, No. H-94-4222 (S.D.Tex. 1994) (protective order). It limits disclosure of “confidential information” to the court, the attorneys retained by plaintiffs, plaintiffs’ employees and contractors, court reporters, and retained experts. It covers “any document, information or other thing furnished by Defendant HISD regarding the sexual abuse and sexual harassment occurring in HISD, in compliance with the Magistrate’s Order of July 31, 1995.” The *Becerra* protective order states:

A document, information or other thing produced by HISD regarding the sexual abuse and sexual harassment occurring in HISD is “Confidential Information” within the meaning of this Order.

....

Confidential Information shall not be made public by any party, unless it becomes part of the public record of this action.

Becerra v. Asher, No. H-94-4222. In addition, the order restricts the future disclosure of the documents produced:

The provision of this Order regarding the use and/or disclosure of Confidential Information shall survive the termination of this action, and the Court shall retain jurisdiction with respect to this Order for purposes of compliance enforcement.

Id. at 4. In compliance with this order and pursuant to section 552.107(2), the district must not release confidential information as defined in the order. The proper authority to determine access to “confidential information” is the court that entered the protective order; therefore, we defer to the court on the issue of the public availability of the documents covered by the order.

The district also claims that it must not release student information that is protected by FERPA and sections 552.026 and 552.114 of the Public Information Act. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). Section 552.026 of the Government Code requires the release of information requested under the Public Information Act to conform with FERPA. “Education records” under FERPA are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, you have elected to withhold information from disclosure under sections 552.026 and 552.114 without seeking a decision from this office.

You claim that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); Open Records Decision No. 551 at 4 (1990). You have identified pending litigation and demonstrated how the requested information relates to that litigation; therefore you may withhold the information from disclosure pursuant to section 552.103.

We note that once all parties to litigation have gained access to the information at issue, through discovery or otherwise, section 552.103(a) is no longer applicable. Open Records Decisions Nos. 551 (1990), 454 (1986). In addition, once the litigation has concluded, section 552.103(a) is no longer applicable. Open Records Decision No. 350 (1982).²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH\ch

Ref: ID# 124532

Encl: Submitted documents

²We note that the requestor has excluded from his request information that is covered by the attorney-client or attorney work product privileges. However, since we have determined that all of the submitted information is protected by section 552.103, we do not specifically consider whether the information is protected by these privileges.

cc: Mr. Wayne Dolcefino
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(w/o enclosures)